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有限责任公司股权拍卖中股东优先购买权
的行使

The Exercise of Pre-emptive Rights of Limited
Liability Company Shareholders in Equity Auction

柳 依 嘉

指导教师姓名: 朱 炎 生 教 授

专 业 名 称: 民 商 法 学

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摘 要

在我国,《中华人民共和国公司法》(以下简称《公司法》)规定了股东的优先购买权。《中华人民共和国拍卖法》(以下简称《拍卖法》)规定的拍卖是通过公开竞价的形式,遵循公开、公平、公正、诚实信用的原则,依价高者得原则确定买受人的一种特殊交易方式。拍卖制度与股东优先购买权制度的冲突在于:如果允许拍卖中行使优先购买权,则会损害其他竞买人平等的法律地位,挑战拍卖“价高者得”、“落槌成交”等拍卖规则的适用,破坏拍卖的秩序和公信力。如果不允许在拍卖中行使优先购买权,则无法体现股东较于其他普通竞买人的“优先性”的特殊权利,剥夺了股东优先购买的法定权利。股东优先购买权与股权拍卖之间的冲突,也是《公司法》与《拍卖法》之间的价值冲突问题。《最高人民法院关于人民法院民事执行中拍卖、变卖财产的规定》(以下简称《拍卖、变卖财产的规定》)明确了在强制拍卖中允许股东行使其优先购买权。该司法解释在一定程度上突破了《拍卖法》对拍卖基本原则及拍卖中“价高者得”规则的规定。但在普通拍卖中是否允许行使股东优先购买权,拍卖中如何行使股东优先购买权以及如何协调股东优先购买权的行使与拍卖制度之间的冲突等问题都是值得讨论的。

除引言和结语外,本文分为四章:

第一章介绍了股权拍卖与股东优先购买权在立法上的冲突,并引入股权拍卖中是否应保护股东优先购买权的理论争议。

第二章分析了股权拍卖中股东优先购买权行使的法理机制。首先分别对股东优先购买权制度和拍卖制度进行具体分析,然后对股权拍卖中行使优先购买权冲突的表现及产生冲突的原因进行深入分析。

第三章通过比较法上的考察与分析,提取出有利于我国制度构建的经验借鉴。

第四章对我国拍卖中股东优先购买权行使的制度构建提出完善建议,并提出具体的拍卖程序的制度设计方案。

关键词: 股东优先购买权; 拍卖; 同等条件

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ABSTRACT

In China, company law stipulates the pre-emptive rights of shareholders. Auction law stipulates that auction follow the principle of openness, fairness, impartiality and good faith by the form of public bidding, and the buyer is determined by the highest bidder principle. The conflict between auction and pre-emptive rights is that if pre-emptive rights are permitted to exercise in the auction, it will damage the equal legal status of other bidders, challenge the rule of “highest bidder” and “hammer auction” in auction, and undermine the order and credibility of auction. If pre-emptive rights are not permitted to exercise in auction, the priority right of shareholders can not be reflected, the legal right of the shareholders is deprived. The value conflict between equity auction and pre-emptive rights of shareholders is the conflict between auction law and company law. The provision of Supreme People’s Court about auctioning or selling off property by the people’s courts in civil execution allow pre-emptive rights of shareholders exercise in forced auction. The judicial interpretation breaks the fundamental principle of auction and the “highest bidder” rule. But whether pre-emptive rights of shareholders is permitted to exercise in auction, how to exercise pre-emptive rights in auction, how to coordinate pre-emptive rights and auction system and other problems are worthy of discussion.

This thesis is divided to four chapters except introduction and conclusion.

The first chapter introduces the conflict between pre-emptive rights of shareholders and equity auction in legislation, and put forward the controversy theory of whether pre-emptive rights should be protected in equity auction.

The second chapter analyzes the legal mechanisms of pre-emptive rights of shareholders exercise in equity auction. This part analyzes pre-emptive rights of shareholders and auction system respectively, then explore the presentation and reason of the conflict.

The third chapter is about the legislation in other countries, then extract some experiences to system reconstruction in china.

The fourth chapter provides suggestion on the system construction, and proposes specific auction procedure institution construction scheme.

Key Words: pre-emptive rights of shareholders; auction; equal conditions

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引言

根据《公司法》第七十一条第三款的规定，有限责任公司股东在同等条件下享有优先购买权。法律规定股东优先购买权是为维护公司内部股东之间的合作信任关系，保障股东的合法权益，维护有限责任公司人合性这块基石。

《拍卖法》规定的拍卖作为一种特殊的交易形式，采取公开竞价的方式以便最大限度地发现标的物的最大价格并使标的物实现价值最大化。拍卖应当严格遵循公开、公平、公正、诚实信用的原则，依价高者得原则确定买受人，以拍卖师落槌确定拍卖的成交。股权拍卖中行使股东优先购买权的冲突在于：如果允许拍卖中行使优先购买权，则会损害其他竞买人法律地位的公平性，挑战拍卖“价高者得”、“落槌成交”等拍卖规则的适用，人们对拍卖规则的预期被打破，破坏拍卖的公信力。若不允许拍卖中行使优先购买权，股东只能以普通竞买人身份参与拍卖，无法体现其较之于普通竞买的第三人的“优先性”，极易破坏有限责任公司的“人合性”。然而，股权拍卖与股东优先购买权之间的冲突，也是《拍卖法》与《公司法》之间的价值冲突问题。

《拍卖、变卖财产的规定》明确规定了在强制拍卖中允许股东行使其优先购买权，该司法解释在一定程度上突破了《拍卖法》对拍卖基本原则及拍卖中“价高者得”规则的规定。但是，《拍卖、变卖财产的规定》中对于多个优先权股东在拍卖过程中同时主张行使优先购买权的处理方法与《公司法》对于多个股东同时主张行使优先购买权的规定又不尽相同。

《公司法》与《拍卖法》之间具体的冲突体现为股东优先购买权制度与拍卖基本原则、“价高者得”规则、“落槌成交”规则的冲突以及股权变现价值最大化和维护公司人合性之间的冲突。冲突产生的原因主要在于股权拍卖与股东优先购买权这两种制度的设立背景不同、价格形成机制不同、保护的核心利益不同。关于拍卖中是否允许行使股东优先购买权，存在肯定说与否定说之争。国外对这个问题的观点主要分为两类：否定说是以德国为代表的在法律规定中直接否定优先购买权在强制拍卖中的适用，在其核心利益保护的考量中更加偏向于债权人的利益，欲通过强制执行激发所有竞买者的潜

力，全面实现拍卖标的价值的最大化，最大化地保护债权人的利益；肯定说是以法国、台湾为代表的规定在拍卖中允许优先购买权的行使，在核心利益的考量中更偏向于优先权人的利益，认为如果拍卖中不允许行使股东优先购买权，剥夺了优先购买权人的法定权利，造成股东优先购买权制度的架空，不利于优先权人的利益保护。《拍卖、变卖财产的规定》体现了在拍卖中允许优先购买权行使的立法取向，但对制度的设计仍不够精细。再者，《拍卖、变卖财产的规定》只是最高人民法院规定的在强制执行程序中对被执行财产进行拍卖变卖的司法解释，其并未对普通财产进行拍卖变卖是否允许优先购买权行使加以规定。故对于普通财产买卖中的拍卖是否允许优先购买权的行使有必要进行进一步的统一规范，以促成《公司法》与《拍卖法》的良好衔接，既能保证优先权人权利的行使又能保证拍卖交易的顺利和秩序的稳定。

有鉴于此，有必要对股权拍卖中股东优先购买权行使制度加以梳理研究，明晰相关法理机制，深入分析股权拍卖与股东优先购买权制度产生冲突的原因，完善相关法律制度，对具体法律制度的构建提出建议。

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